IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN FLOYD TENNANT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

NO. 21997

FILED

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APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

EDWIN L. MILLER, JR.
United States Attorney

SHELBY R. GOTT
Assistant U.S. Attorney

325 West "F" Street
San Diego, California 92101

Attorneys for Appellee,
United States of America

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty in all counts of a three-count indictment following trial by jury.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 751 and 3231, and Title 21, United States Code, Section 176(a).

II

STATEMENT OF THE CASE

Appellant was charged in each count of a three-count indictment returned on August 19, 1964. Count One alleged that appellant, together with Jerald Alfred Trujillo, knowingly and with intent to defraud, imported two pounds of marihuana into the United States from Mexico [C.T. 2].[1]

Count Two alleged that appellant, together with Jerald Alfred Trujillo, knowingly and with intent to defraud, concealed and facilitated the transportation and concealment of two pounds of marihuana in violation of Title 21, United States Code, Section 176(a) [C.T. 3].

Count Three charged that appellant was in the custody of an officer of the United States pursuant to lawful arrest for a felony and did escape from such custody in violation of Title 18, United States Code, Section 751 [C.T. 4].

Jury trial on all three counts commenced and ended on April 22, 1965, before the late Honorable William C. Mathes, wherein appellant was found guilty on all three counts.

Thereafter on May 12, 1965, Judge Mathes sentenced appellant to six years on each of Counts One and Two to run concurrently, and five years on Count Three to run consecutively with the sentences on Counts One and Two, making a

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[1] "C.T." refers to Clerk's Transcript.

total of eleven years to serve [C.T. 37].

Appellant did not appeal from this judgment. On December 19, 1966, he filed a motion for post conviction relief under Title 28, United States Code, Section 2255. The Honorable Fred Kunzel ordered the clerk of court to file a notice of appeal nunc pro-tunc as of May 12, 1965 [C.T. 46].

III

ERROR SPECIFIED

1. The trial court committed error in denying defendant's motion for judgment of acquittal.

2. The trial court committed error by its instructions and comments to the jury on the issue of custody and legal arrest.

3. The trial court committed error in failing to give defendant's requested instruction on the issue of custody.

IV

ARGUMENT

A. THE APPEAL IS NOT TIMELY.

On May 24, 1965, final judgment was entered, but sentence was pronounced on May 12, 1965. The record is not clear as to why final judgment was not entered until May 24, 1965, subsequent to sentencing.

Notice of appeal, without a showing of excusable neglect, would expire ten days later on June 3, 1965.

Upon a showing of excusable neglect, Federal Rule of Criminal Procedure 37(a)(2) extends the time an additional thirty days. Assuming excusable neglect, this would appear to extend the time to July 3, 1965.

The court has no power to extend the time beyond this date of July 3, 1965, regardless of the circumstances.

The first known communication concerning an appeal was a motion pursuant to Title 28, U.S.C., Section 2255, filed on December 19, 1966. Therefore, because failure to make an appeal within the time fixed by Rule 37(a)(2), Federal Rule of Criminal Procedure, is mandatory and jurisdictional, and, having been taken too late, the court is without authority to entertain the appeal.

United States v. Robinson, 361 U.S. 220, 224;

Banks v. United States, 240 F.2d 302 (9th Cir. 1957);

Marion v. United States, 171 F.2d 185, 186 (9th Cir. 1948), rehearing denied January 28, 1949;

Crow v. United States, 203 F.2d 670, 672 (9th Cir. 1948).

The appeal is, therefore, not timely.

B. THE APPELLANT WAS IN CUSTODY PURSUANT TO LAWFUL ARREST, THEREFORE, IT FOLLOWS THAT:

FIRST: The trial court did not commit error in denying defendant's motion for judgment of acquittal.

SECOND: The trial court did not commit error by its instructions and comments to the jury on the issue of custody and legal arrest.

THIRD: The trial court did not commit error in failing to give defendant's requested instruction on the issue of custody.

Appellee agrees with the appellant's contention that custody arises pursuant to a lawful arrest. (Appellant's brief, page 9) Therefore, when it has been shown that one has been placed under lawful arrest, it has also been shown that the same person has been taken into custody.

It is clear that in the absence of an applicable federal statute, which specifically defines the requirement of an arrest, the law of the state where an arrest without a warrant takes place will determine its validity.

United States v. Di Re, 332 U.S. 581, 589 (1947)

California states the procedure for making an arrest in Penal Code Section 835:

"METHOD OF MAKING ARRESTS: AMOUNT OF RESTRAINT. An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention."

A submission to custody has been found, for purposes of arrest, in accord with California Penal Code, Section 835, when the evidence disclosed that a defendant-motorist stopped when he saw a police vehicle following him, alighted from his automobile, and was accused by the policemen of violating the California Vehicle Code. People v. Randolph (1957), 306 P.2d 98, 147 Cal. App. 2d 836. The court in Randolph noted that the defendant voluntarily stopped his automobile and that "the situation did not then indicate the necessity of further physical force or restraint for the purpose of actually taking the defendant into physical custody." The California court held that Randolph had been in custody for the purposes of the arrest statute, even though he had not been told that he was being placed under arrest. The facts of the instant case are stronger for finding arrest of appellant. Appellant was specifically told by a uniformed customs inspector that he was under arrest.

In People v. Martensen, 76 Cal. App. 763, the court found custody pursuant to a lawful arrest upon the following

facts: The defendant, stopped for speeding, refused to exhibit his operator's license, give his name, or in any manner reveal his identity. Thereupon, the officer advised the defendant that he was under arrest.

Appellant's liberty of movement was sufficiently restricted for the purpose of effecting an arrest. Appellant's immobility from the time that he was first told that he was under arrest until he put his car in motion certainly is evidence of custody pursuant to a lawful arrest. At the very least, appellant was in lawful custody during this time, pursuant to a lawful arrest.

Appellant attempted to escape by pushing away the arresting officer and attempting to drive away. The court held the defendant had been placed under arrest prior to being taken into "actual custody."

The California cases, cited by appellant, are distinguishable. They do not involve "custody" in terms of an arrest.

The case of People v. Drake, 162 Cal. 248, is concerned with an entirely different situation, that of custody as defined by Section 266(d) of the California Penal Code: ". . . placing in custody any female for the purpose of causing her to cohabit with any male to whom she is not married . . ."

Likewise, the case of People v. Crider, 76 Cal.

App. 101, involves a distinguishable set of facts; that is, custody where a prisoner is under the surveillance of prison guards. One does not have to be a prisoner to be in custody pursuant to lawful arrest.

People of State of California v. Maxwell, 125 F. Supp. 18, is distinguishable in that it involves the "custody" which results from a suspect, first arrested by the military authorities, subsequently being turned over to the civilian authorities.

Appellant contends that if he is found to have been in the custody of Inspector Yates, "he would be in lawful custody no matter where he might be in the United States." (Appellant's brief, page 12) However, appellant fails to recognize that one can be in lawful custody without being physically constrained. (See Randolph, supra.)

In Frazier v. United States, 339 F.2d 745, and in Giles v. United States, 157 F.2d 588, 591-2, dissenting opinions cited by appellant are distinguishable in that an arrest is not there involved.

In Henry v. United States, 361 U.S. 98, 103, cited in Plazola v. United States, 291 F.2d 56 (9th Cir. 1961), the court stated: ". . . the arrest took place when the federal agents stopped the car. That is the view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest,

for purposes of this case, was complete." It is noted that Henry was not told he was under arrest.

United States v. Person, 223 F. Supp. 982 (S.D. CAL, C.D., 1963), cited by appellant, is also distinguishable in that it is not an arrest case. In that case the defendant was not found to have been in custody when he breached the terms and conditions of "his authorized excursion" to visit his grandmother. It is obvious that when one is authorized to do an act his liberty of movement is not being restricted. Tennant was not authorized to depart the scene.

Appellant contends that before an arrest can be effected, the "arrestee" must understand that he is being detained for the purposes of an arrest (appellant's brief, page 10).

Jenkins v. United States, 161 F.2d 99, cited by appellant for the above proposition is distinguishable from this case. For, contrary to this case, Jenkins was not found to be under arrest because the purported "arrestor" had not communicated to the "arrestee" that he was under arrest. If the law were to require that every person understand he is under arrest in order for the "arrest" to be effective, it would be impossible to arrest a person who was so mentally incompetent or deranged that he could not understand that he was being placed under arrest. However, appellant was told he was under arrest.

Appellant contends that there must always be an intent on the part of one to arrest the other and an intent on the part of such other to submit. (Appellant's brief, page 10) Foreman v. Warden, 241 F. Supp. 161, 163-4, is cited erroneously by appellant for the above proposition. Foreman was asked to step out of a bar onto the street to speak to an officer, who told Foreman that he was suspected of burglary and asked him to come down to the police station. It was argued that Foreman was merely "accosted" on the street and was not arrested until after he was identified at the police station. The court held that "he was arrested on the street." In so holding, the court in Foreman chose not to follow Cornish v. State, 215 Md. 64, 67, 237 A.2d 170, 172 (1957), relied on by Foreman. Foreman was never told that he was under arrest. It is very unlikely that Foreman intended to submit to an arrest which he did not know and understand was taking place. Tennant knew he was under arrest, when he sped away.

Appellee contends that one neither has to submit or even understand that he is being placed under arrest. In Trimble v. United States, 369 F.2d 950, 951 (District Court of Columbia, 1966), it was stated: "His arrest occurred during his pursuit by the complaining witness, who shouted to an officer in the vicinity that the two men he was pursuing, who turned out to be Trimble and Johnson, had robbed him."

Inspector Yates did not need probable cause to arrest or search the appellant at the border. It is doubtful that the Inspector had probable cause since he only had a "feeling that there was some undeclared merchandise in the car." (Appellant's brief, page 4) The dissent in Gilliam v. United States, 189 F.2d 321, 327 (6th Cir. 1951), cited in Plazola v. United States, supra, at 60, states: "If officers do not have probable cause to arrest or search, their restraint of another's freedom of locomotion by words, acts or the like, which would induce reasonable apprehension that force would be used unless he submitted, constitutes an arrest. To constitute an arrest, it is not necessary to touch the person of one who is arrested, or to state to him that he is arrested. It is enough to constitute an arrest if the conduct of the officers operates on the will of the person threatened, and results in a reasonable fear of personal difficulty or personal injury." [Emphasis added.]

Following the Gilliam rationale, if all the attendant facts and circumstances are viewed most favorably to the government, there can be no question but that appellant was in custody pursuant to lawful arrest. The stopping of appellant's car, which remained still for some period of time, however brief, subsequent to notification of arrest, was a restraint upon appellant's freedom of locomotion. The notifying of appellant that he was under arrest put appellant

in fear that force would be used unless he submitted. That the conduct of Inspector Yates operated on the will of the appellant, there can be no question. Appellant raced off at high speed causing the Inspector to fall from the vehicle. Appellant, in fear of personal difficulties, left his passenger and companion, Mr. Trujillo, behind.

The Randolph case is cited with approval in Plazola, supra, at 60. In Plazola the court stated: "Again, we concede there may be a difference of opinion as to whether an arrest takes place when a siren is sounded, or at the instant a car is stopped, or not until there exists a restraint on the individual's liberty of movement." From this statement it is obvious that this is consequently a question for the jury to decide. Here the jury did in fact decide the question and such factual determinations should not be disturbed on appeal.

Once the trier of fact has returned a guilty verdict, the evidence must be viewed most favorably to the government, which includes indulgence in all permissable inference in its favor.

Glasser v. United States, 315 U.S. 60 (1942).

Stein v. United States, 337 F.2d 14 (9th Cir. 1964).

V

CONCLUSION

Appellee respectfully submits that appellant's conviction be sustained.

Respectfully submitted,

EDWIN L. MILLER, JR.
United States Attorney

SHELBY R. GOTT
Assistant U.S. Attorney

Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Shelby R. Gott

SHELBY R. GOTT